EXHIBIT 2
DATE 4/5/11
HB HB 574

Senate Judiciary 4/05/11

Re: HB 574 – Constitutional referendum to specify no right to abortion or its public funding

Mr. Chairman and members of the committee, my name is Rebecca Mastee. I represent the Montana Catholic Conference and speak on behalf of the two Roman Catholic Bishops of Montana.

First, I want to take you back to 1972, the year the most recent Montana Constitutional Convention concluded. Our current Constitution was adopted by the Convention on March 22, 1972. It was then submitted to the voters at a special election on June 6 of this same year. A publication went out to inform voters of the language of the new Constitution, with explanation of the new text. Included in this was the sample ballot, which asked voters whether they were for or against the proposed Constitution, as well as whether they wanted a bicameral or unicameral legislature, wanted to authorize gambling, and whether they were for or against the death penalty. No part of the Constitution or this publication mentions abortion. Its explanation of the Right of Privacy merely states: "New provision prohibiting any invasion of privacy unless the good of the state makes it necessary."

When voters headed to the polls for this special election, state law prohibited abortion unless the procedure was "necessary to preserve the life of the mother." This prohibition was longstanding, having been enacted in the Bannack Statutes back in the late 1800s. The approval of our current Constitution occurred prior to the legalization of abortion by *Roe v. Wade*[1] in 1973. The people could not have considered the ramifications of a court interpreting an expanded right to abortion in the Constitution, as a handful of Montana judges have done.

Now, I share with you the legal precedent of the past fifteen to twenty years, which resulted from court challenges of a variety of reasonable abortion regulations – regulations which were enacted by this legislative body.

1) In 1995, a state-like "Hyde Amendment" to limit the funding of abortion, was struck down at the district court level and declared unconstitutional under the Montana Constitution,[2] despite the fact that in 1980 the U.S. Supreme Court upheld a similar regulation under the U.S. Constitution.[3]

2) The only Montana Supreme Court opinion on this issue was decided in the 1999 *Armstrong v. State* case. Here, a requirement that only physicians perform abortions was first challenged in federal court. The U.S. Supreme Court denied the requested injunction, clearly implying that the statute was Constitutional.[4] A challenge was then initiated in state court, where the Montana

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[1] *Roe v. Wade*, 410 U.S. 113 (1973).
[2] *Jeannette R. v. State*, 1995 Mont. Dist. LEXIS 795 (1995).
[3] *Williams v. Zbaraz*, 448 U.S. 358 (1980).
[4] *Mazurek v. Armstrong*, 520 U.S. 968 (1997).

Supreme Court declared the physician only requirement unconstitutional according to the Montana Constitution.[5]

3) Similarly, a Parental Notification with Judicial bypass statute[6] was first challenged in federal court. Making its way to the highest court in the land, the U.S. Supreme Court declared the statute constitutional.[7] Another challenge was then initiated in state court, where a Montana District Court Judge declared parental notification prior to an abortion unconstitutional based on the Montana Constitution.[8]

4) Next, a Montana Partial Birth Abortion Ban[9] was declared unconstitutional under the state Constitution by a district court judge in 1998.[10] However, the U.S. Supreme Court has upheld a federal Partial-Birth Abortion Ban with its 2007 *Gonzales v. Carhart* opinion.[11]

5) Finally, the requirement for Informed Consent prior to an abortion, with a 24 hour reflection period[12] was declared unconstitutional under the Montana Constitution by a district court judge in 1999.[13] Yet a similar requirement had already been upheld by the U.S. Supreme Court under the U.S. Constitution in 1992.[14]

In sum, each of these regulations that the Montana legislature has placed on the abortion industry – regulations which are all valid under the U.S. Constitution – have been deemed unconstitutional under the state Constitution. Now, although the people want abortion to be regulated, legislative efforts to do so are frustrated because of the precedent set through these opinions which are written by only three Montana judges. Each interpreted the Montana Constitution to provide a greater "right" to abortion than that found within federal law.

The Montana Constitution does not mention abortion. It was approved while abortion was illegal. The Constitutional Convention did not discuss any "right" to abortion, let alone a fundamental right. Only later did the courts interpret the document to contain an expanded "right" to abortion, when invalidating regulations of the abortion industry which were enacted by the people, through their elected officials. With this dichotomy surrounding such a complex and important issue, the people deserve a chance to clarify just what they intended their Constitution to provide.

Rep. Warburton's Constitutional Referendum does just this. It allows the people to clarify that there is no state constitutional right to abortion or the public funding of abortion. After all, the Constitution is

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[5] *Armstrong v. State*, 296 Mont. 361 (1999).
[6] MCA 50-20-201 et seq.
[7] *Lambert v. Wicklund*, 117 S. Ct 1169 (1997).
[8] *Wicklund v. State*, 1999 Mont. Dist. LEXIS 1116 (1999).
[9] MCA 50-20-401.
[10] *Intermountain Planned Parenthood v. State*, 1998 Mont. Dist. LEXIS 782 (1998).
[11] *Gonzales v. Carhart,* 127 S. Ct. 1610 (2007).
[12] MCA 50-20-301 et seq.
[13] *Planned Parenthood of Missoula v. State*, 1999 Mont. Dist. LEXIS 1117 (1999).
[14] *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992).

the people's document and provided by this same document, they are entitled to alter it as needed.[15] With this referendum, they will be empowered to correct the unwarranted expansion of abortion "rights" in this state, which was created via judicial interpretation. HB 574 merely ensures that the Constitution reflects the will of the people regarding this issue.

The referendum states:

> **Nothing in this constitution grants or secures a right to abortion or the public funding of abortion.**

This language is similar to what is found in the Rhode Island Constitution (Art. I, § 2),[16] and says there is no state constitutional right to abortion. It is important to note, however, that with this amendment, abortion will remain legal, as it is today, under federal law.

Other states have taken similar measures to modify their Constitutions in response to the courts. Florida recently amended its Constitution, after the Florida Supreme Court struck down a statute requiring parental notification prior to abortion. Tennessee is currently in the process of amending its Constitution in response to an unwarranted expansion of abortion rights by its Supreme Court.

Once approved by the voters, this proposed amendment impacts only the Montana Constitution. This amendment allows the people of Montana to overturn abortion precedent and reclaim their rightful authority to regulate abortion and its funding, within federal constitutional limits. It will not change federal law. It will not prohibit abortion or make abortion illegal. It does not regulate abortion or establish policy binding the legislature, and will not affect any woman's right to get an abortion. Rather, it makes the Montana Constitution abortion neutral. Neutralizing the state Constitution on this issue will merely allow the regulation of abortion and its public funding to be considered in light of federal law. As noted earlier, many common sense regulations of the abortion industry, which are intended to protect women and children, are constitutional, enforceable, and valid measures under federal law.

This amendment restores balance to the Constitution of Montana, by allowing the people, acting through their elected legislators, to enact reasonable regulations on abortion and its funding that are fully consistent with the U.S. Constitution, as interpreted by the U.S. Supreme Court.

We support this restoration of balance and encourage you to do the same.

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[15] Montana Constitution, Art.II, Sec. 2 (1972). The Montana Constitution's self-government provision provides that the people **"may alter... the constitution... whenever they deem it necessary."**

[16] This provision guarantees due process and provides: ***"Nothing in this section shall be construed to grant or secure any right relating to abortion or the funding thereof."***